

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

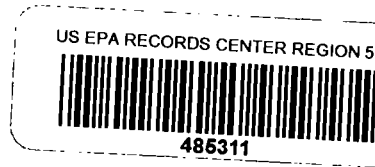
UNITED STATES OF AMERICA,

Plaintiff,

v.

CONTINENTAL CHEMISTE CORPORATION,
and KENNETH KASS,

Defendants.



Civil Action No. 87 C 10214

Honorable George M. Marovich

DOCKETED

DEC 14 1988

CONSENT DECREE

WHEREAS, Plaintiff, United States of America, on behalf of the United States Environmental Protection Agency ("U.S. EPA") filed the Complaint in this action on November 30, 1987, against Kenneth Kass and Continental Chemiste Corporation ("Chemiste"), alleging violations of Sections 12(a)(1)(A), 12(a)(1)(E), 12(a)(2)(B) and 12(a)(2)(K) of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"),

WHEREAS, the Parties agree that it is in the best interest of both parties and the public that this Consent Decree be entered;

NOW, THEREFORE, before the taking of any testimony upon the pleadings, without adjudication of any issue of fact or law, and upon consent agreement of the parties to this Decree,

IT IS HEREBY ORDERED AND DECREED as follows:

I. JURISDICTION; VENUE

The parties stipulate and the Court finds that:

1. This Court has jurisdiction over the subject matter herein under Section 16(c) of FIFRA, 7 U.S.C. § 136n(c), and under 28 U.S.C. §§ 1331 and 1345.

2. The Court has jurisdiction over the Defendants.

3. Venue properly lies in the United States District Court for the Northern District of Illinois because Defendant Chemiste's principal place of business is located in this District, Defendant Kass has a principal place of residence in this District, and the violations are alleged to have occurred in this District.

II. APPLICABILITY

4. The provisions of this Decree shall apply to and be binding upon the Defendants, their partners, officers, directors, agents, servants, employees, successors, and assigns.

III. FINDINGS OF FACT

For the purposes of this action only the parties stipulate and the Court finds:

5. Defendant Kass is past president of Defendant Chemiste. At the time of entry of this Decree, he is an employee of

Defendant Chemiste. His residence is 21 East North Avenue, Lake Forest, Illinois, 60045.

6. Defendant Chemiste is engaged in the business of producing and selling certain pesticides, with a principal place of business at 2250-2256 W. Ogden Avenue, Chicago, Illinois 60612 ("Chemiste facility").

7. The Defendants are engaged in the production, packaging, distribution and sale of pesticides at the Chemiste facility.

8. On September 30, 1983, a Notice of Intent to cancel pesticide products containing lindane was published in the Federal Register. 48 Fed. Reg. 48512. Said Notice stated the Administrator's intent to cancel the registrations of lindane smoke fumigation devices for indoor use.

9. Defendants' products Smo-Cloud (EPA Reg. No. 495-6-Cancelled), Moth-Cloud (EPA Reg. No. 495-8-Cancelled) and Bug-Tab (EPA Reg. No. 495-7) fall under the purview of said Notice.

10. Defendant Chemiste requested an adjudicatory hearing to contest the cancellation of Smo-Cloud.

11. On November 29, 1984, Defendant Chemiste agreed to withdraw its request for hearing in FIFRA Docket No. 524, et al., following amendment of the Notice of Cancellation to provide that cancellation of registration for Smo-Cloud will be effective May 31, 1986.

12. On February 8, 1985, an amendment to the September 30, 1983, Notice ("Cancellation Order") changed the effective date for the cancellation of Smo-Cloud to May 31, 1986. 50 Fed. Reg.

5424-26. The Cancellation Order also changed the labeling requirements on the Defendants' products.

IV. COMPLIANCE PROGRAM

13. Defendants shall immediately comply and thereafter comply with FIFRA and the Cancellation Order.

14. Within 60 days from the date of entry of this Decree, Defendant Chemiste shall notify, by means of U.S. Mail, all of Chemiste's distributors and retailers which appear as shipping receivers and/or as purchasers of more than 2,000 ounces of Smo-Cloud and/or Bug Tab on Chemiste's invoices or packaging documents for the delivery of Smo-Cloud or Bug-Tab after May 31, 1986, ("receivers"). All receivers to be notified are listed in Attachment A to this Consent Decree. Such notice shall provide that the receivers may no longer sell Smo-Cloud and Moth-Cloud and that all sales of these products should have ceased as of February 7, 1987. These receivers are required to dispose of their stocks of these products in accordance with the Resource Conservation and Recovery Act ("RCRA") or return these stocks to Chemiste. This notice shall also provide that Bug-Tab shall not be sold unless the label is marked "not for indoor use."

A copy of this communication and a list of all addressees shall be submitted to EPA within 60 days from the entry of this Decree.

15. Defendant Continental Chemiste Corporation shall accept all stocks of Smo-Cloud and Bug Tab returned from the receivers notified pursuant to paragraph 14.

16. Within 90 days after the date of entry of this Decree, and quarterly thereafter until the termination of this Decree, Defendant Chemiste shall notify EPA which receivers have returned stocks of Smo-Cloud, Moth-Cloud and/or Bug-Tab to Chemiste and the quantity returned. Defendant Chemiste shall include in these notices to EPA an accurate total of all stocks of these products added to Defendant Chemiste's inventory and held at the Chemiste facility.

17. Within 12 months after the date of entry of this Decree, Defendant Chemiste shall dispose of in accordance with the Resource Conservation and Recovery Act ("RCRA") 42 U.S.C. 6901 et seq., reformulate into a registered product or export all stocks of Smo-Cloud and Moth-Cloud within its possession, including all returned products. Defendant Chemiste shall also dispose, reformulate and/or export every 6 months all products received after the 12 month period in accordance with this paragraph.

18. Defendant Chemiste shall provide the personal guarantee of its president, Mr. Jacob H. Martin, to ensure Defendant Chemiste's performance as set forth in paragraph 17 of this Decree. This guarantee shall provide that in the event Defendant Chemiste fails to perform as set forth in paragraph 17, Mr. Jacob H. Martin shall pay to EPA the full cost of the proper disposal,

in accordance with RCRA, of all of Defendant Chemiste's stocks of Smo-Cloud and Moth-Cloud. These costs include, but are not limited to, transportation, storage, disposal and documentation costs. Payment of these costs shall in no manner reduce or change any obligations for the payment of stipulated penalties for which Continental Chemiste may be liable pursuant to paragraph 22 of this Decree.

19. Defendants shall not sell, distribute, hold for sale, offer for sale, ship, deliver for shipment or offer to deliver to any person any pesticide which is not registered under Section 3 of FIFRA, 7 U.S.C. § 136a including Smo-Cloud (EPA Reg. No. 495-6-Cancelled) and Moth-Cloud (EPA Reg. No. 495-8-Cancelled).

20. Defendants shall not violate the cancellation of a registration of any pesticide under Section 6 of FIFRA, 7 U.S.C. § 136d.

21. Defendants shall not sell, distribute, hold for sale, offer for sale, ship, deliver for shipment or offer to deliver to any person any pesticide which is misbranded, including Bug-Tab (EPA Reg. No. 495-7) which must be labeled "not for indoor use."

V. STIPULATED PENALTIES

22. (a) Defendant Chemiste stipulates that it shall be liable for payment of a penalty of \$500.00 for each day the deadlines established in this Decree are not met for the first seven days and \$1000.00 per day thereafter. In the event that Defendant Kass becomes an officer, director or controlling

shareholder of Continental Chemiste Corporation and conducts the day to day operations of that corporation during the effective period of this Decree, Defendants shall be jointly and severally liable for the payment of penalties as specified in this paragraph.

(b) Stipulated penalties are payable upon demand by cashier's check to "Treasurer, United States of America" and shall be mailed to:

Branch Secretary
Air, Water, Toxics & General Law Branch (5CA-16)
Office of Regional Counsel
U.S. Environmental Protection Agency
Region V
230 South Dearborn Street
Chicago, Illinois 60604

On any amount overdue, interest shall accrue at the rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717. In addition, after the first thirty (30) days that an amount is overdue, a late payment handling charge of Twenty Dollars (\$20.00) is owed and an additional charge of Ten Dollars (\$10.00) is owed for every subsequent thirty (30) day period that any monies are overdue. For amounts overdue past 90 days, a six per cent penalty shall be applied.

Defendant Chemiste is liable for any such penalties, interest or charges. In the event that Defendant Kass becomes an officer, director or controlling shareholder of Continental Chemiste and conducts the day to day operations of that corporation during the effective period of this Decree,

Defendants shall be jointly and severally liable for any such penalties, interest or charges.

(c) Stipulated penalties are not the exclusive remedy of Plaintiff for Defendants' violations of this Decree, and Plaintiff reserves the right to use any other remedies to which it is entitled including, but not limited to, injunctive and additional monetary relief.

VI. FORCE MAJEURE

23. (a) Defendants obligations under this Decree shall be performed within the time limits set forth in the Decree unless performance is prevented or delayed by a Force Majeure event. For purposes of this Consent Decree, "Force Majeure" is defined as any event arising from causes beyond Defendants' control which delays or prevents the performance of any obligation under this Decree, including but not limited to Acts of God or War, and judicial or legislative actions which prevent compliance with the provisions of this Decree. "Force Majeure" shall not include increased costs of performance of any activity required by this Decree, the financial inability of Defendants to perform their obligations under this Decree or the failure to apply for any required permits or approvals or to provide all information required therefore in a timely manner.

(b) Any party to this Decree having difficulty meeting the terms of this Decree due to a Force Majeure event shall notify the other parties promptly by telephone of any change in circumstances giving rise to the suspension of performance, or

the non-performance, of any obligation under this Decree. In addition, within 14 days of the occurrence of circumstances causing such difficulty, the party experiencing the difficulty shall provide a written statement to EPA of the reason(s) therefor, the anticipated duration of the delay, the measures taken and to be taken to prevent or minimize the delay, and the timetable for the implementation of such measures. Failure to give notice shall constitute a waiver of any claims of Force Majeure by Defendants.

(c) If EPA agrees that a delay is or was attributable to a Force Majeure event, EPA shall promptly notify Defendants in writing and specify the additional time that is allowed to complete the specific phase of work or any succeeding phase of work affected by such delay.

VII. GENERAL PROVISIONS

24. In the event that Defendant Kass becomes an officer, director or controlling shareholder of Defendant Continental Chemiste Corporation, and conducts the day to day operations of the corporation during the effective period of this Decree, Defendant Kass, as well as Defendant Chemiste, shall be subject to the provisions in paragraphs 14, 15, 16 and 17 of this Decree.

25. Notices, etc. All plans, notifications and other submittals required by this Decree to be submitted to U.S. EPA shall be addressed to:

Chief, Pesticides & Toxics Substances Branch
Environmental Services Division
U.S. Environmental Protection Agency
230 South Dearborn Street

Chicago, Illinois 60604

A copy of all such submittals shall also be sent to:

Mr. Larry Werries, Director
Illinois Department of Agriculture
State Fair Grounds
Springfield, Illinois 62794-9281

The cover letter to each submittal shall state that it is being submitted pursuant to this Decree and shall refer to particular paragraphs of this Decree.

26. Modification. Any modification of this Decree must be in writing and approved by the Court. Any such written modification must be executed by both Defendants and by the United States, the latter by the Assistant Attorney General, Land and Natural Resources Division and by the Assistant Administrator of the Office of Enforcement and Compliance Monitoring.

27. Other Laws. This Decree in no way affects Defendants' responsibility to comply with any other state, federal or local regulations or any Order of this Court. This Decree does not limit the authority of the United States to initiate actions under Section 13 of the Act, 7 U.S.C. § 136k.

28. Public Documents. All information and documents submitted by Defendants pursuant to the Decree shall be subject to public inspection.

29. Entry. Defendants consent to entry by representatives of the United States and U.S. EPA at the Chemiste Facility to conduct inspections or to otherwise ensure their compliance with this Decree, the Act and the Amended Notice.

30. Termination. This Decree shall terminate three years after its entry, after Defendants move for such termination and only if they have fully complied with all provisions of this Decree.

31. Retention of Jurisdiction. Until termination of this Decree, the Court shall retain jurisdiction to modify and enforce the terms and conditions of this Decree and to resolve any disputes arising hereunder as may be necessary or appropriate for the construction or execution of this Decree.

32. Severability. Should any provision of this Decree be declared by a court of competent jurisdiction to be inconsistent with State or Federal law and therefore unenforceable, the remaining provisions shall remain in effect.

For Plaintiff - UNITED STATES OF AMERICA:

By: Richard J. Marzulla
ROGER J. MARZULLA
Assistant Attorney General
Land and Natural Resources Division
United States Department of Justice
Washington, D.C. 20530

Dated: 9/8/88

By: Kurt Weissmuller
KURT WEISSMULLER, Attorney
Environmental Enforcement Section
Land and Natural Resources Division
United States Department of Justice
P.O. Box 7611
Benjamin Franklin Station
Washington, D.C. 20044-7611

Dated: 8/26/88

ANTON R. VALUKAS
United States Attorney
Northern District of Illinois

By: Thomas L. Adams, Jr.
THOMAS L. ADAMS, JR.
Assistant Administrator
for Enforcement and Compliance
Monitoring
U.S. Environmental Protection
Agency
Washington, D.C. 20460

Dated: 8/11/88

By: Robert Sprunger for
VALDAS V. ADAMKUS
Regional Administrator
U.S. Environmental Protection
Agency
Region V
Chicago, Illinois 60604

Dated: 7/18/88

By: Scott R. Dismukes
SCOTT R. DISMUKES
Assistant Regional Counsel
U.S. Environmental Protection
Agency
Region V
Chicago, Illinois 60604

Dated: 6/13/88

For Defendant - KENNETH KASS

By: Kenneth K. Kass
KENNETH KASS

Dated: May 3, 1988

For Defendant - CONTINENTAL CHEMISTE CORPORATION:

By: *Jacob H. Martin*
JACOB H. MARTIN
President

Dated: *May 3, 1988*

Entered this *22nd* day of *September*, 1988

George M. Marovich
GEORGE M. MAROVICH
UNITED STATES DISTRICT JUDGE
DEC 13 1988

* Attachment A

Sav-On Dist. Center
300 E. Cerritos Ave.
Anaheim, California 98205

Hank Hatfield Hdwe
1104 4th Street
Sioux City, Iowa 51101

Atlas South
900 E 120th
Chicago, Illinois 60628

B E Atlas
4300 North Kilpatrick
Chicago, Illinois 60641

EC Lockwood
10100 Pacific Ave.
Franklin Park, Illinois 60131

Hardware Wholesalers, Inc.
Progress Drive
Dixon, Illinois 61021

Lebovitz Wholesale
5007 S. Lawndale
Chicago, Illinois 60632

Northshore Distributing
405 Academy Drive
Northbrook, Illinois 60062

Home Hardware
6042 Central Avenue
Portage, Indiana 46368

Stay Ready
2944 W. 15th Ave.
Gary, Indiana 46404

Bluestem Farm & Ranch
2611 West Hwy 50
Emporia, Kansas 66801

Dick Roberts Supply
1011 E. 10th
Hutchinson, Kansas 67501

Central Hardware
1111 Boulder Industrial Dr.
Bridgeton, Missouri 63044

Berks Exterminating
2671 Yougstown Rd SE
Warren, Ohio 44484

General Pest Control
4224 Riverdale RFD
Ogden, Utah 84405

A and B Pro Hdwe
6306 22nd Avenue
Kenosha, Wisconsin 53140

Crown Hdwe
2016 N 3rd Street
Milwaukee, Wisconsin 53212

Hardlines Marketing
4039 W. Green Tree Road
Milwaukee, Wisconsin 53223

Wal-Mart Stores, Inc.
P.O. Box 116
Bentonville, Arkansas 72716

Ace Hardware
2200 Kensington Court
Oakbrook, Illinois 60521

Dominicks Finer Foods
5555 Northwest Avenue
North Lake, Illinois 60164

Cotter and Company
P.O. Box 6868
Chicago, Illinois 60680

House Hasson Hardware
2570 Devon Avenue
Des Plaines, Illinois 60018

Frederick Trading
2570 Devon
Des Plaines, Illinois 60018

Wyeth Co
2570 Devon
Des Plaines, Illinois 60018

Whites Hdwe
5523 South Halsted
Chicago, Illinois 60621

Oscro Drug
3030 N. Cullerton
Franklin Park, Illinois 60131

Jaydon Inc.
P.O. Box 1399
Rock Island, Illinois 61201

Kruse Hardware
2570 Devon
Des Plaines, Illinois 60018

Nelson-Roanoke Corporation
2570 Devon
Des Plaines, Illinois 60018

Hardware Wholesalers, Inc.
P.O. Box 868
Ft. Wayne, Indiana 46801

Coast to Coast
P.O. Box 80
Minneapolis, Minnesota 55440

United Hdwe/Hdwe Hank
P.O. Box 410
Minneapolis, Minnesota 55440

Witte Hardware
4600 Goodfellow Blvd.
St. Louis, Missouri 63120

Wheatbelt, Inc.
P.O. Box 20287
Kansas City, Missouri 64195

Wright & Wilhelmy
513 S. 10th
Omaha, Nebraska 68102

Bostwick Braun
P.O. Box 930
Toledo, Ohio 43692

American Hdwe Supply Company
P.O. Box 308 Dept 34197
Butler, Pennsylvania 16001